Schwickert's of Rochester, Inc. *and* United Union of Roofers, Waterproofers and Allied Workers Local Union No. 96

Schwickert, Inc. *and* United Union of Roofers, Waterproofers and Allied Workers Local Union No. 96. Cases 18–CA–16899, 18–CA–16936, 18–CA–17031, 18–CA–16900, 18–CA–16937, and 18–CA–17029

December 16, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On May 25, 2004, Administrative Law Judge Mark D. Rubin issued the attached decision. The Respondents filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondents filed a reply brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified and set forth in full below.[3]

The judge found that the Respondents violated Section 8(a)(5) of the Act by withdrawing from multiemployer bargaining, by withdrawing recognition from the Union and refusing to bargain with it, and by unilaterally implementing changes in terms and conditions of employment. The judge also found that the Respondents violated Section 8(a)(3) of the Act by constructively discharging five employees. We adopt these findings for the reasons set forth by the judge.[4] Contrary to our dissenting colleague, we also adopt the judge's finding that the Respondents violated Section 8(a)(1) of the Act by telling employees that they would no longer be represented by the Union and by providing employees with union resignation forms and envelopes in which to mail them.

As more fully set forth in the judge's decision, the Respondents bargained with the Union as members of a multiemployer association for over 20 years, with the most recent collective-bargaining agreement effective from June 1999 to May 31, 2003.[5] Multiemployer bargaining for a successor contract got underway May 14 and continued on May 21, but with little or no meaningful progress. Two participants from the employers' side of the negotiating table testified that different contractors within the association had different objectives and positions.

Bargaining resumed May 29; all parties agreed negotiations that day were difficult. Because of the association members' divergent positions, Union Business Manager Bob Danley testified that he felt like he "was getting hit from all sides." Frustrated, Danley snapped: "I might as well negotiate this contract the way I do in Wisconsin." In Wisconsin, as all present were aware, Danley bargains with employers individually. An association representative sarcastically replied, "Oh yeah, Bob, that really works well in Wisconsin." After this exchange, multiemployer bargaining resumed, and at the end of the day Danley agreed to take the association's offer to the union membership for a vote. Based on these facts, the judge found, and we agree, that Danley's offhand "Wisconsin" remark was merely rhetorical or sarcastic, and was understood as such.

The union membership rejected the association's May 29 proposal, and the parties scheduled another bargaining session for June 13. However, on June 12, the Respondents informed the Union by letter that they were withdrawing from multiemployer bargaining and accepting the Union's "offer" to negotiate separately. On June 15 or 16, Danley phoned the Respondents' president, Kent Schwickert, and left a voicemail asking Schwickert to call him so they could discuss the Respondents' June 12 letter. There is no evidence that Schwickert returned Danley's call. On June 18, the Respondents informed the Union by letter that they had repudiated the collective-bargaining agreement.[6]

[1] The Respondents also filed a motion to reopen the record, which the General Counsel opposed in his answering brief, and to which the Charging Party filed a brief in opposition. We deny the Respondents' motion.

[2] The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We shall modify the judge's recommended Order and substitute a new notice in conformity with the violations found and the Board's standard remedial language.

[4] In finding a "constructive discharge" violation, Chairman Battista notes that the Respondents did not defend on the basis that there was no constructive discharge. Their sole defense to these allegations was the nonmeritorious defense that the withdrawal of recognition was lawful.

[5] All dates hereafter are in 2003 unless stated otherwise.

[6] The contract had already expired May 31. The judge found, and we agree, that by their letter, the Respondents were informing the Un-

On June 19, the Respondents convened a meeting with their employees and informed them that they had repudiated their bargaining relationship with the Union. Kent Schwickert, the Respondents' president, told the employees that they could remain union members, but that the Union could fine the employees for continuing to work for the Respondents, and that the employees would be responsible for paying these fines. The employees were then told that the Respondents were implementing changes in their health insurance, holiday and vacation pay, and sick leave. Union resignation forms were made available to employees at the back of the room, and stamped envelopes with which to mail them were later left in their timecard slots.

The judge found that the Respondents' conduct at the June 19 meeting violated Section 8(a)(1). He explained that inasmuch as the Respondents were bound to multiemployer bargaining at that time, the Respondents were prohibited from telling their employees that they no longer enjoyed union representation, that the Respondents would no longer deal with their Union as the employees' representative, that the Union could fine employees for continuing to work for the Respondents, and that the Respondents were making changes in wages and benefits. The judge further explained that in light of these unlawful statements, the Respondents' actions in preparing and placing union resignation forms at the back of the meeting room, and distributing stamped envelopes in which to mail the resignation forms, further violated Section 8(a)(1) because the employees would tend to feel peril in refraining from utilizing the forms. We agree with these findings.

Our dissenting colleague agrees that the Respondents' withdrawal from multiemployer bargaining and repudiation of the collective-bargaining relationship was unlawful. Nevertheless, he would reverse the judge's 8(a)(1) violation findings involving the Respondents' conduct on June 19 because, in his view, the Respondents had a good-faith defense that their withdrawal and repudiation were lawful, and therefore the employees could not reasonably be coerced by that conduct. We disagree with our colleague for several reasons.

To begin with, our colleague has invoked a rationale the Respondents themselves not only did not argue, but also affirmatively waived. In their exceptions brief, the Respondents freely admitted that the judge "correctly concluded that each of the remaining unfair labor practice allegations"—i.e., the non-Section 8(a)(5) allegations—"depend on whether Respondents lawfully terminated their relationship with the Union." The Respondents have waived the argument upon which our colleague relies, and therefore it is not appropriate for consideration. See, e.g., *Trailmobile Trailer, LLC*, 343 NLRB No. 17, slip op. at 4 (2004).[7]

Furthermore, Kent Schwickert could not have believed, honestly and in good faith, that Danley's "Wisconsin" comment was a serious offer to bargain with the Respondents individually. As the facts recited above make plain, Danley's comment was, and was understood as, nothing more than a sarcastic, off-the-cuff outburst. Moreover, Danley left Schwickert a voicemail asking Schwickert to call him about the June 12 letter purporting to accept Danley's "offer," and Schwickert never responded. Thus, it appears that Schwickert avoided having the very conversation with Danley that would have made the already self-evident meaning of Danley's "Wisconsin" remark explicit. Under these circumstances, Schwickert could not have formed the honest, good-faith belief our colleague attributes to him.

Finally, even assuming Schwickert held such a good-faith belief, our colleague has not explained how that would affect the coercive tendency of the Respondents' June 19 conduct. The applicable test is an objective one; intent and motivation are immaterial. See, e.g., *KSM Industries*, 336 NLRB 133, 133 (2001); *Miller Electric Pump & Plumbing*, 334 NLRB 824, 824 (2001). Thus, the coercive tendency of the Respondents' June 19 conduct does not depend on Kent Schwickert's beliefs, reasonable or otherwise.

Accordingly, we adopt the judge's finding that the Respondents violated Section 8(a)(1) as alleged.

ORDER

The National Labor Relations Board orders that the Respondents, Schwickert's of Rochester, Inc., Rochester, Minnesota, and Schwickert, Inc., Mankato, Minnesota, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Constructively discharging or otherwise discriminating against employees because they engage in union

ion that they were repudiating their Sec. 8(f) collective-bargaining relationship with the Union.

[7] Elsewhere, our colleague acknowledges the very principle we rely upon here. In a personal footnote, he adopts the judge's Sec. 8(a)(3) constructive discharge finding because the Respondents "did not defend on the basis that there was no constructive discharge," but instead argued solely "the nonmeritorious defense that the withdrawal of recognition was lawful." But that was also the Respondents' sole defense to the 8(a)(1) violations. Again, their expressly stated position is that "*each* of the remaining unfair labor practice allegations depend on whether Respondents lawfully terminated their relationship with the Union" (emphasis added). Nevertheless, our colleague purports to find a distinction between the Respondents' 8(a)(3) and (1) defenses. There is no such distinction.

activities or to discourage employees from engaging in such activities.

(b) Withdrawing or withholding recognition from the Union, unilaterally changing, or imposing new, terms and conditions of employment on their employees, refusing to participate in multiemployer bargaining with the Union, or otherwise refusing to bargain in good faith with the Union as the exclusive collective-bargaining representative of employees in the following unit:

> All full and regular part time journeymen and apprentice employees employed as roofers, and damp and waterproofing workers by Respondents at their Rochester and Mankato, Minnesota, facilities, excluding guards and supervisors as defined in the Act, and all other employees.

(c) Informing employees that they are no longer represented by the Union, or providing employees with forms and stamped envelopes for the purpose of resigning from the Union, at a time when the Respondents are obligated to recognize the Union as the collective-bargaining representative of employees in the unit set forth above.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, Respondent Schwickert's of Rochester offer Ray Oman and Brad Musel, and Respondent Schwickert offer Jerry Mundt, Ryan Augustine, and Ben Pugh, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make whole Ray Oman, Brad Musel, Jerry Mundt, Ryan Augustine, and Ben Pugh for any loss of earnings and other benefits suffered as a result of the discrimination against them. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(c) Within 14 days from the date of this Order, remove from their files any references to the terminations or resignations of Ray Oman, Brad Musel, Jerry Mundt, Ryan Augustine, and Ben Pugh, and within 3 days thereafter notify them in writing that this has been done and that the terminations or resignations will not be used against them in any way.

(d) Reinstate the wages, benefits, and other terms and conditions of employment that were changed on or about June 19, 2003, without first bargaining with the Union.

(e) Make whole each bargaining-unit employee for any losses or expenses incurred as a result of the changes in wages, benefits, and other terms and conditions of employment that were implemented on or about June 19, 2003, without first bargaining with the Union.

(f) Recognize the Union as the exclusive collective-bargaining representative of employees in the unit set forth above.

(g) Upon request of the Union, rejoin multiemployer bargaining, and bargain with the Union on that basis.

(h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(i) Within 14 days after service by the Region, post at their facilities in Rochester and Mankato, Minnesota, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondents' authorized representative(s), shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondents have gone out of business or closed either or both of the facilities involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since June 12, 2003.

(j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

Dated, Washington, D.C. December 16, 2004

Wilma B. Liebman, Member

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN BATTISTA, dissenting in part.

Contrary to my colleagues and the judge, I do not find that the Respondents violated Section 8(a)(1) of the Act by telling employees that they were no longer represented by the Union, or by providing them with union resignation forms and stamped envelopes with which to mail them.[1]

The relevant facts are as follows. After 20 years of successive collective-bargaining agreements, the Respondents, through their multiemployer bargaining association, began bargaining with the Union on May 14, 2003[2] for a contract to replace the one due to expire later that month. After several fruitless bargaining sessions, Union Representative Bob Danley remarked during a bargaining session held on May 29 that he "might as well negotiate this contract the way I do in Wisconsin." All the parties understood this to be a reference to the Union's practice of engaging in individual negotiations in that state.

The Respondents then faxed and mailed a letter to the Union on June 12 in which it stated that it was accepting the Union's purported offer to engage in individual bargaining. The Respondents sent a second letter to the Union on June 18, repudiating their collective bargaining relationship.

On June 19, the Respondents convened a meeting with all of its employees at which the Respondents' president, Kent Schwickert, told them that the Respondents had repudiated its bargaining relationship with the Union. He also said that although the employees could continue to work for the Respondent and still retain their union membership, they might be subject to union fines for which they would be solely responsible. During this meeting, the Respondents left union resignation forms at the back of the room for any employees who wished to take them. The Respondents later placed stamped envelopes in the employees' mail slots for mailing resignation forms to the union.

The Respondents' speech on June 19 was lawful. The Respondents had indeed repudiated their bargaining relationship with the Union. Although the Board (and I) are today finding that this withdrawal of recognition was unlawful, this does not gainsay the point that the Respondents were reciting a true fact to their employees. Nor does it gainsay the point that the Respondents had a good-faith defense that the withdrawal was lawful. My colleagues argue that Schwickert could not have believed that Danley's "Wisconsin statement" was truly an offer to bargain individually. Although the judge has found that Danley's comment was a sarcastic one, it was not unreasonable for Schwickert to take even a sarcastic comment at face value and to act on that basis.

Schwickert's failure to return Danley's subsequent phone message is interpreted by my colleagues as proof of Schwickert's avoidance of a clarifying conversation. This interpretation is pure speculation about Schwickert's motive. It is at least as reasonable to find that Schwickert did not return the call because he did not want to provide Danley with an opportunity to withdraw the offer.

The Respondents affirmatively assured employees that they could retain their union membership while working for the Respondents. The Respondent never indicated that the employees' job status or benefits would be affected by their resignation/nonresignation from the Union. The Respondents also told employees that they could be fined by the Union if they chose to remain union members. Again, this was a truthful statement.

In light of these truths, it was not unreasonable for the Respondents to believe that some employees would choose to resign their memberships. To that end, the Respondents provided resignation letters, taking care not to identify those who sought to resign and those who did not.

In all of the above circumstances, I do not believe that the employees would reasonably be coerced by the Respondents' remarks.

My colleagues contend that I am precluded from relying upon the fact that the Respondents had a colorable defense to the 8(a)(5) allegations. They contend that the Respondents waived this defense. I would not construe the Respondent's exceptions so narrowly, i.e., I would not find a clear and unmistakable waiver. The Respondents argued to the Board that its conduct at the June 19 meeting was lawful because it was done in furtherance of a lawful repudiation of its bargaining relationship. That argument, in my view, is at least closely related to the notion that the Respondents acted in reliance on a colorable defense to the 8(a)(5) allegations. It requires, at a minimum, due consideration of the fact that the Respondents did not convey to employees that it was deliberately acting contrary to its statutory obligations. I would not preclude such consideration.[3]

[1] I join my colleagues in adopting the judge's findings in all other respects.

[2] All dates herein are 2003 unless otherwise noted.

[3] Compare the "constructive discharge" allegation, where the Respondents did not defend at all on the basis that there was no constructive discharge. See fn. 4 of majority opinion.

Dated, Washington, D.C. December 16, 2004

Robert J. Battista, Chairman

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT constructively discharge or otherwise discriminate against you because you engage in union activities or to discourage you from engaging in such activities.

WE WILL NOT withdraw or withhold recognition from the Union, United Union of Roofers, Waterproofers and Allied Workers Local Union No. 96, unilaterally change, or impose new, terms and conditions of employment, refuse to participate in multiemployer bargaining, or otherwise refuse to bargain in good faith with the Union as the exclusive collective-bargaining representative of employees in the following unit:

> All full and regular part time journeymen and apprentice employees employed as roofers, and damp and waterproofing workers by us at our Rochester and Mankato, Minnesota facilities, excluding guards and supervisors as defined in the Act, and all other employees.

WE WILL NOT inform you that you will no longer be represented by the Union, or provide you with forms and stamped envelopes for the purpose of resigning from the Union, at a time when we are obligated to recognize the Union as your collective-bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order offer Ray Oman, Brad Musel, Jerry Mundt, Ryan Augustine, and Ben Pugh reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed.

WE WILL make whole, with interest, Ray Oman, Brad Musel, Jerry Mundt, Ryan Augustine, and Ben Pugh for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the terminations or resignations of Ray Oman, Brad Musel, Jerry Mundt, Ryan Augustine, and Ben Pugh and WE WILL within 3 days thereafter, notify them in writing that this has been done and that the terminations or resignations will not be used against them in any way.

WE WILL reinstate the wages, benefits, and other terms and conditions of employment that we changed on or about June 19, 2003, without first bargaining with the Union.

WE WILL make whole each bargaining-unit employee for any losses or expenses incurred as a result of the changes in wages, benefits, and other terms and conditions of employment we implemented on or about June 19, 2003, without first bargaining with the Union.

WE WILL recognize the Union as the exclusive representative of our employees in the unit set forth above.

WE WILL, upon request of the Union, rejoin multiemployer bargaining, and bargain with the Union on that basis.

SCHWICKERT'S OF ROCHESTER, INC. AND SCHWICKERT, INC.

David M. Biggar, Esq. and *Kristyn Myers, Esq.*, for the General Counsel.

Timothy B. Kohls, Esq., of Minneapolis, Minnesota, for the Respondent.

DECISION

STATEMENT OF THE CASE

MARK D. RUBIN, Administrative Law Judge. This case was tried in Minneapolis, Minnesota, on February 4 and 5, 2004, based on charges filed on June 24, July 21, and October 21, 2003,[1] by United Union of Roofers, Waterproofers and Allied Workers Local Union No. 96 (Charging Party or Union) against Schwickert's of Rochester, Inc. (Schwickert's Rochester) and Schwickert, Inc. (Schwickert) (jointly, Respondents).

The Regional Director's consolidated complaint, dated September 23, alleges that the Respondents violated Section 8(a)(5) of the Act by untimely and illegal withdrawal from a multiem-

[1] Unless otherwise indicated, all dates occurred in 2003.

ployer bargaining group, by the subsequent withdrawal of recognition from, and refusal to bargain with, the Union, and by the unilateral implementation of new terms and conditions of employment, including health insurance and other fringe benefits. The complaint also alleges that Respondents violated Section 8(a)(1) by threatening employees that they would no longer have union representation, distributing prepared union resignation forms to employees, and providing postage and envelopes to employees and advising them they were to be used to mail resignations to the Union, and violated Section 8(a)(3) by constructively discharging employees Ray Oman, Brad Musel, Jerry Mundt, Ryan Augustine, and Ben Pugh.

Respondents deny constructively discharging the five employees, deny the alleged independent 8(a)(1) violations, affirmatively maintain that the Union consented to their withdrawal from the multiemployer association, and maintain that they were entitled to unilaterally end their Section 8(f) collective-bargaining relationship with the Union after the expiration of the collective-bargaining agreement. The following issues are, thus, presented by this litigation: whether the Union consented to or acquiesced in Respondents' withdrawal from multiemployer bargaining; whether Respondents were entitled to withdraw their recognition of the Union pursuant to Section 8(f) of the Act; whether Respondents engaged in the actions alleged to be violations of Section 8(a)(1) and whether those actions violate that Section of the Act; and whether Respondents' actions alleged to have violated Section 8(a)(1) and (5) caused the resignations and, hence, resulted in the constructive discharges of the five-named employees.

At the trial, the parties were afforded a full opportunity to examine and to cross-examine witnesses, to adduce competent, relevant, and material evidence, to argue their positions orally, and to file posttrial briefs. Based on the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs and oral argument of the Respondents and the General Counsel, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent Schwickert's Rochester, a Minnesota corporation, maintains an office and place of business in Rochester, Minnesota, where it has been engaged as a commercial roofing contractor in the construction industry. Respondent Schwickert, a Minnesota corporation, maintains an office and place of business in Mankato, Minnesota, where it has been engaged as a mechanical and roofing contractor in the construction industry. The parent corporation of both Respondents is Schwickert's of Mankato, Inc., which, in turn, is owned by Tecta America Corporation. Both Respondents, individually, during the 12-month period preceding May 31, 2003, in conducting their business operations, purchased and received at their Minnesota places of business goods and services valued in excess of $50,000 directly from suppliers located outside the State of Minnesota, and derived gross revenues in excess of $500,000. I find, and it is admitted, that Respondents are now, and have been at all times material, employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Roofing Contractors of the Southeastern Minnesota Area (association) has been an organization composed of various employers, including Respondents, engaged as roofing contractors in the construction industry, one purpose of the association being to represent employers in negotiating and administering collective-bargaining agreements with the Union. During the 12-month period ending May 31, 2003, members of the association, collectively, in conducting their businesses in the construction industry, provided services valued in excess of $50,000 for customers located outside the State of Minnesota, and those members during that period, in conducting their business operations, purchased and received at their respective facilities in the State of Minnesota goods valued in excess of $50,000 directly from points outside the State of Minnesota. I find that at all material times the employers represented by the association, collectively, have been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

I find, and it is admitted, that the Union is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

The association, utilizing the bargaining services of the Sheet Metal, Air Conditioning, and Roofing Contractors Association (SMARCA), has engaged in multiemployer bargaining with the Union for over 20 years, and has entered into a series of collective-bargaining agreements with the Union, the most recent of which was effective from June 19, 1999, to May 31, 2003. During this period, Respondents have been members of the association, and pursuant to Section 8(f) of the Act, have recognized the Union as the exclusive bargaining representative of their roofers and waterproofers. The most recent agreement also covered contractors Winona Heating and Ventilation (Winona), Kiker Brothers Roofing (Kiker) and two or three other small contractors. Schwickert employs about 30 roofing employees, and Schwickert's Rochester has about 15 employees, including roofers.

About January 28, 2003, the Union sent letters to Respondents, and to Kiker and Winona, giving notice of reopening of the collective-bargaining agreement upon expiration, and enclosing designation of representation forms, by which each employer could "name another party to represent your company on your behalf, should you choose to not represent yourself." All four employers who were members of the association completed the forms, thereby designating SMARCA as their representative for the upcoming contract negotiations. Respondents' forms were both dated February 17, 2003. Respondents, Kiker, Winona, and SMARCA met on April 8 to discuss goals and issues in the upcoming negotiations with the Union. The discussion included making a list of contract proposals, guessing what proposals the Union would be making, and the current economic conditions. Kent Schwickert, president of Respondents, represented Respondents, while Rick Kiker represented Kiker, Tom Plachecki, and Roger Green represented Winona, and James Bigham, CEO of SMARCA, represented SMARCA.

The four association contractors and SMARCA again met on May 14, and prepared a written contract proposal for the Union. This proposal contained all the terms and conditions of employment which the association members desired to achieve, and was based on input from all four contractors, including Respondents, at the meetings of April 8 and May 14. Later on May 14, the Union and the association met for the first of three collective-bargaining negotiation meetings. CEO Bigham and General Counsel John Quarnstrom represented SMARCA, Business Manager Bob Danley and Business Agent Mike Stinson represented the Union, Schwickert represented Respondents, Plachecki and Green represented Winona, and Kiker represented Kiker. At this meeting, the Union, and the association, represented by SMARCA, exchanged proposals and discussed issues.

The same parties and individuals met again for bargaining on May 21. The parties discussed their proposals, but little or no progress towards an agreement occurred at this session. At the hearing, Schwickert testified that during this session he began to perceive two stumbling blocks in negotiations: that the Union didn't understand the contractors' needs, and that the individual association members had different objectives. Similarly, Bigham testified that he began to perceive obstacles to a successful negotiation because the contractors maintained discrete positions on some of the proposals.

The same parties and individuals met again for bargaining on May 29, but this time a Federal mediator also attended the session. All parties agreed that this day's negotiations were difficult. Business Manager Danley began the session by rejecting the association's proposal for a change to the subcontracting language, and every time Danley made a proposal or counterproposal it was rejected by Bigham. According to Danley, Bigham was the spokesman for the association, "but you could tell where they [the positions] were coming from." This was an apparent allusion to Danley's view that the strong positions the association was taking were, in reality, coming from the individual association members rather than Bigham or SMARCA. According to Danley, he felt like he "was getting hit from all sides," and "so I made an off-the-cuff comment to the employers and said I might as well negotiate this contract the way I do in Wisconsin." Danley, and the other attendees, understood this to mean a reference to the Union's method of bargaining with individual employers in Wisconsin, as opposed to the association's multiemployer bargaining in Minnesota. Further, Bigham observed that Danley was visibly frustrated at the time he made the comment. Bigham sarcastically responded, "Oh yeah Bob; that really works well in Wisconsin."[2] Schwickert added, "We are all a team here."[3] Bigham further responded that individual bargaining would not be good for the "industry," and Danley agreed with him.

The May 29 bargaining continued for an hour or two after Danley's "Wisconsin" comment, and at the conclusion of the meeting Danley agreed to take the association's offer back to the membership for a ratification vote. Upon the membership's subsequent rejection of the proposed contract, the association and Union scheduled another bargaining session for June 6. Prior to June 6, however, Danley called Bigham and asked to cancel the meeting for personal reasons. Bigham and Danley agree to reschedule the bargaining session to June 13. During the period between June 6 and 13, Bigham had individual conversations with the representatives of the members of the association.

According to Bigham, the purpose of these conversations was to agree to a date for the resumption of contract negotiations following the cancellation of the June 6 meeting, and to discuss Bigham's perception that there were significant differences as to contractual priorities among the association members, which could cause bargaining to fail.[4] For example, Bigham told Schwickert that the parties (the contractors) had differing opinions on issues and that Winona wasn't going to sit tight with some of the things Respondents wanted and that it was "pretty clear" that if "we were going to have an agreement we'd have to work apart." Bigham told Schwickert that a subcontractor clause, a major issue to Respondents, was not a concern for Winona, but that a "helper" job classification, which was unimportant to Respondents, was a major issue for Winona.

Despite Bigham's expressed pessimism however, Bigham and Schwickert reached no decisions as to the future course of

[2] Contrary to both Bigham and Danley, Schwickert testified that Bigham replied somewhat positively to Danley's comment by saying that it was a good idea, and "maybe we should," and that Bigham's response was genuine, not sarcastic. As in other areas of conflict, I credit Danley's testimony over Schwickert. I found Danley to be a credible witness who, generally, was responsive to questions from either side, unhesitant in responding, and forthright in his answers. Schwickert, on one occasion, changed his testimony at trial upon being shown an earlier, inconsistent affidavit, and was occasionally hesitant and not responsive to questions. Here, in particular, where Schwickert testified in contravention of both Bigham and Danley, I do not credit Schwickert's testimony that, in essence, Bigham endorsed Danley's "Wisconsin" comment.

[3] As to the "team" comment testified to by Danley, Schwickert denies the comment and Bigham doesn't recall Schwickert responding to either Danley's comment or Bigham's response. When asked whether, in fact, Schwickert made the "team" comment, Bigham testified, "I don't believe so." For the reasons set forth above, I credit Danley over Schwickert. For similar reasons, I credit Danley over Bigham, in areas of disputed testimony. Danley impressed me as a credible witness, as noted above. Despite neither Bigham nor SMARCA being a respondent in this case, and while it does not appear they have a vested interest in the outcome, Bigham, by his demeanor, clearly favored Respondent, which called him as a witness. Bigham's answers to Respondent counsel's questions were forthright and unhesitant. His answers to counsels for the General Counsel's questions tended to be hesitant, and were occasionally nonresponsive, unconvincing, or shifting. For example, Bigham changed his testimony a number of times as to whether Danley used the word "individually" (as in bargain individually) when he made the "Wisconsin" comment, finally settling on the answer that Danley did use the word.

[4] Respondent's brief, citing certain transcript pages, asserts that in his individual conversations with the contractor-members Bigham discussed "Danley's offer to bargain with each contractor individually." While there is evidence that Bigham spoke to the contractors concerning his pessimism about reaching an agreement because of differences between the contractors, the record does not support the assertion that Bigham specifically discussed Danley's "Wisconsin" comment or any offer to bargain individually.

negotiations with the Union during their conversation.[5] However, on June 11, Schwickert sent a letter to Bigham giving "formal notice" that Respondents were withdrawing from the multiemployer bargaining with the Union. The letter stated that Respondents were accepting the Union's "offer" to negotiate separately because "after considering the current status of negotiations we see and feel there are irreconcilable differences on several items including the subcontracting language."

On June 12, at about 1:30 p.m., Respondents faxed identical letters to Danley, dated June 11 and signed by Schwickert. The letters stated:

> Based upon the clear divisions of the parties and your statement that you will not ever agree to a change in the subcontract clause, we have now decided to accept the offer or proposal you made at one of our negotiation sessions. That is, we will now bargain with you individually and not as part of any multi-employer group, including SMARCA. Accordingly, this is a formal notice that we are withdrawing from the multiemployer group and will bargain with Local 96 on an individual basis.

The letters went on to state that Respondents would not meet with the Union as scheduled on June 13. While the fax stamp on the letters indicated that the letters were faxed the afternoon of June 12 to the Union, Danley testified, without contradiction, that he was not in his office that day and, hence, did not see the letters on June 12.

Also on June 12, at about 2:15 p.m., Bigham faxed a letter to Danley at the Union's office, blaming Danley for the Union's failure to move on several issues important to some of the contractor-members, and stating, "This has caused us to consider your offer that the contractors negotiate separately and they have now decided to dissolve their bargaining group and to negotiate separately.[6] Each company will now negotiate separately. They will also, unless they decide otherwise, continue to use SMARCA services in future negotiations." The letter added, "For the meeting of June 13, those who attended are also willing to meet jointly with you but only under the understanding and agreement that they can withdraw from those joint negotiations at any time." Again, Danley did not see this letter on June 12 as he was not in his office.

The scheduled bargaining session was held on June 13, with Danley and Stinson attending for the Union, Bigham and Quarnstrom for SMARCA, Kiker for Kiker, and Plachecki for Winona. Neither Schwickert nor any other representative for Respondents attended. As the meeting began, Bigham asked Danley if he had seen a letter from Respondents. When Danley stated he had not, Bigham handed Danley a copy of Respondent's June 11 letter, and Bigham's June 12 letter. Danley reviewed the letters, commented to the effect that Respondents had assigned their bargaining rights to SMARCA, and said "let's go."[7]

The Union, SMARCA (by Bigham and Quarnstrom), and the contractors other than Respondents then continued negotiations on June 13, taking up and working from the same proposals they had previously been utilizing in negotiations. During the bargaining session, the Union made a concession in its proposal. After the employer representatives caucused, Bigham told Danley that the Union had made a significant concession, but that the employer side was going to stop negotiations for the day. Danley asked that they continue negotiating, but Bigham responded that he was not sure what the Respondents were going to be doing; that he thought they were exploring all of their options. Bigham encouraged Danley to meet with Schwickert. Danley did, in fact, call Schwickert about June 15 or 16, and left a voicemail message asking Schwickert to call him so they could arrange a meeting to discuss Schwickert's June 12 letter.

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[5] Schwickert's memory appeared hazy as to how many conversations he had with Bigham during the June 6–11 period, as is reflected in the following testimony:

> The Witness (Schwickert): "I don't recall a second one but I know there was more than one."
>
> Judge Rubin: "You don't recall a second one but you know there is more than one.
>
> Is that your answer?"
>
> The Witness: "Best one I got right now."

[6] On cross-examination, after Bigham testified that it was his view that the contractors had no bargaining obligation to the Union following expiration of the collective-bargaining agreement, Bigham denied that this was part of the reason the contractors decided to dissolve the multiemployer bargaining group. After being shown his prior affidavit, where such was indicated, Bigham changed his testimony and admitted that, in fact, the lack of a 9(a) relationship was part, but not the entire, reason for the decision to dissolve the employer-bargaining group.

[7] Bigham testified that he specifically asked Danley whether he understood the letter or letters, that Danley said he did, that Bigham asked Danley if he was willing to proceed on that basis, and that Danley replied, "Let's proceed." Quarnstrom, who reports to Bigham, testified that Bigham merely asked Danley if he understood the letter, and did not testify that Bigham asked Danley if he was willing to proceed on the basis of the letter. I also note that, on cross-examination, Bigham admitted that in a sworn affidavit earlier provided to the NLRB during the investigation he stated that after Danley read the letter the Union continued to negotiate "thus accepting our conditions," but did not state that Danley verbally agreed to Bigham's conditions for continued negotiations. When asked about this seeming inconsistency, Bigham denied it was inconsistent and testified as to his affidavit, "I didn't say there wasn't anything else [to demonstrate Danley's alleged acceptance of Bigham's conditions for bargaining]." I find this answer to be somewhat facile, and one more indication of a witness more interested in helping one side win a case, than in forthrightly answering the questions of counsel. Thus, I conclude, that the truth was set forth in Danley's testimony, and that Bigham's affidavit, to the effect that in Bigham's view Danley agreed to Bigham's conditions by his actions in continuing to bargain, is accurate, as opposed to Bigham's trial testimony to the effect that Danley verbally assented to Bigham's conditions. It defies common sense that if Danley had, in fact, verbally agreed to Bigham's conditions, that Bigham, an attorney and an experienced labor relations professional, would have neglected to set forth that significant detail in his affidavit. Finally, I note that Respondents' brief inaccurately asserts that Quarnstrom agreed with Bigham's testimony to the effect that Bigham specifically asked Danley if he understood that the contractors would only bargain on an individual basis, and that Danley "said he understood and he agreed to negotiate." In fact, as noted above, Quarnstrom explicitly testified: "Jim Bigham stated to [Danley], 'You understand what that letter means?', and Mr. Danley said, 'Yes. Let's go.'" Understanding the meaning of a letter is not the same thing as agreeing to what is set forth in the letter.

On June 18, Respondents sent two identical letters to Danley, both signed by Schwickert, stating that "We have decided to repudiate the collective-bargaining agreement between [Respondents] and Roofers Local 96. We repudiate these two agreements effective at the close of business today, June 18, 2003." While the contract Schwickert referred to in the letters expired May 31, Schwickert testified that it was his intent and understanding that by sending the letters to the Union he was ending the bargaining relationship between Respondents and the Union.[8] When asked at trial why he decided to send the letter, Schwickert responded, "We reviewed the relationship with the Union which had taken place for many years and concluded that the Union and our company had different goals in mind."

Respondents then, on June 19, convened a meeting of all their employees to discuss their abrogation of the collective-bargaining relationship with the Union. Schwickert told the assembled employees that the Respondents had repudiated their relationships with the Union, that employees could continue to work for Respondents and be union members, but that the Union could fine members who worked for nonunion employers, and that those employees would be solely responsible for such fines. Schwickert informed the employees that Respondents had implemented new fringe benefits and wage rates. Respondents' safety/HR director, Mark Viola, testified that he told the employees of the new benefit programs including health and dental insurance, holiday and vacation pay, and sick leave, and paperwork was distributed to the employees detailing the new wage rates and benefits, which were different from those set forth in the expired collective-bargaining agreement. Respondents also made available at the meeting union resignation forms prepared, typed, and photocopied by Respondents. Schwickert described to the assembled employees the union resignation forms, which were placed at the back of the room along with other forms.[9] Subsequent to the meeting, Respondents provided stamped envelopes to each employee in their timecard slots, and advised the employees "that the envelopes could be used to mail the resignation forms to the Union, if they chose to do so, and that the envelopes should be addressed in the employee's own handwriting."[10]

Within a month of Respondents' June 19 employee meeting, five bargaining unit employees of Respondents had resigned their employment. Schwickert employees Ben Pugh, Ryan Augustine, and Jerome Mundt, and Schwickert's Rochester employees Raymond Oman and Brad Musel, all of whom attended the June 19 meeting, tendered their resignations and took jobs with various contractors who maintained collective-bargaining relationships with the Union. All left because of Respondents' unilateral changes in their union-negotiated terms and conditions of employment, and their desire to continue to work for an employer that maintained a bargaining relationship with the Union,[11] and all left Respondents for such employment.

On July 8, in response to Bigham's June 12 letter, Danley wrote to Bigham, maintaining that the contractors' withdrawal from multiemployer bargaining "well after negotiations were underway," constituted an unfair labor practice. Danley characterized his own bargaining table comments as to the apparent differences among the contractors as merely "frustration," and not as a serious offer to negotiate separately with each contractor. On July 9, Bigham wrote to Danley, asserting that Danley did offer to bargain individually with the contractors, and pointed to Danley's "Wisconsin" comment. In the letter, Bigham also accused Danley of bad faith by making a comment at one of the bargaining sessions to the effect that the Union would never agree to SMARCA's subcontracting proposal. On July 11, Danley wrote to Bigham, denying his own bad faith, and expressing hope that Bigham had "changed [his] approach and now [did] have a desire to negotiate in good faith." Danley proposed several dates for the resumption of negotiations. Bigham responded to Danley with a letter dated July 15, in which he informed Danley that Winona and Kiker desired to resume negotiations, "both on an individual basis and not as part of any multiemployer bargaining group." On July 21, the Union filed 8(a)(5) charges against both Schwickert's Rochester and Schwickert, alleging that the Respondents unlawfully and untimely withdrew from multiemployer bargaining.

Another bargaining session took place on July 22, attended by Danley and Stinson for the Union, Bigham and Quarnstrom for SMARCA, Kiker for Kiker, and Plachecki for Winona. Thus, except for the Respondents, the same parties and individuals who had been present during the multiemployer bargaining, were present for the resumed negotiations. Bigham testified that SMARCA's role at the meeting was to represent Winona and Kiker, individually. Neither the Union, the contractors, nor SMARCA made new proposals at this meeting, but instead worked from previous proposals and tentative agreements from the meetings of May 14, 21, and 29, and June 13. Neither side changed items previously tentatively agreed to, nor resurrected proposals that had been previously rejected. Tentative agreement was reached at this meeting, and the union membership voted approval at a ratification vote on July 29. However, as found below, no contract between the Union and SMARCA, or the association, or any of the contractors involved in this case, has been signed to date.

Almost 3 months later, on October 8, Stinson met with Bigham, and presented him with a written version of the July 22 agreement. Bigham reviewed the written agreement, and

[8] In Respondents' brief, it is conceded that the intent of the June 18 letter was to repudiate Respondents' individual relationships with the Union.

[9] While there was also testimony from some witnesses that the forms were distributed to employees at the meeting, I credit the witnesses who testified that the forms were placed at the rear of the meeting room, and accessible to all the employees present. The testimony of these witnesses was consistent, and makes sense in the credited overall context of the meeting.

[10] The parties, in essence, stipulated to such.

[11] Pugh's testimony, on cross-examination, indicated that he also was unhappy with his supervisor, but that his primary motive for his resigning was Respondents' repudiation of its collective-bargaining relationship with the Union. I credit that testimony as Pugh's testimonial demeanor and responsiveness to questions from both sides was impressive, and while Pugh may have been unhappy with his supervision, he didn't resign until after the June 19 meeting.

then told Stinson that the title page "had the Association language on it and that this language needed to be removed because the parties had negotiated separately." Bigham testified that Stinson replied that "he knew that we were bargaining that way but that the reference to the multiemployer unit should remain because the parties agreed to the same contract terms for Winona and Kiker." On cross-examination, Bigham admitted that in a letter dated October 17 sent to Region 18 of the National Labor Relations Board, in which he describes in some detail this meeting with Stinson, there is no mention of this comment, which Bigham alleges Stinson made. Stinson did not testify.[12]

Thereafter, about December 5, Bigham sent a letter to Danley stating that, "To the extent the bargaining relationship still exists, the [association] hereby repudiate[s] the Section 8(f) collective-bargaining agreement and bargaining relationship with [the Union] on behalf of itself and the individual contractors it represents. Additionally, please be advised that we have terminated and dissolved the multiemployer bargaining group." In response, the Union filed additional charges against Kiker and Winona, alleging that they had unlawfully withdrawn from multiemployer bargaining.[13]

On January 26, 2004, Bigham and Quarnstrom of SMARCA, Kiker, and Plachecki met with Danley. Danley distributed to the other participants written copies of the unsigned July 22 agreement, prepared by the Union. The parties discussed the contractual language the parties had agreed to in July, and Bigham's objections to the union draft that he had written to Danley about in October. Bigham testified that at this meeting Danley acknowledged that there were separate agreements for Kiker and Winona, but Bigham further testified that the terms of the Kiker and Winona agreements were identical. Subsequent to this meeting, Danley sent Bigham new written agreements prepared by the Union, changed to reflect Bigham's complaints raised at the January 26, 2004 meeting. Despite these changes, including a change to the cover page to reflect one contract for Winona and one for Kiker, Bigham still refused to sign the agreement because the signature pages still referenced the association and SMARCA language contained in the agreement since the original draft prepared by the Union and presented to Bigham in October. Bigham has since insisted that the Union remove the references to the association and SMARCA, but the Union has not agreed. The agreements remain unsigned.

[12] Again, and for the reasons set forth above, I decline to credit Bigham's account of Stinson's alleged comment. As noted earlier, if, in fact, Stinson had made the comment, it defies logic that Bigham, an attorney well versed in labor relations, would have failed to include such detail in his letter to the Region in which he details the conversation. While it is true that Stinson did not testify, I also note that counsels for the General Counsel objected to the relevance of this entire line of testimony.

[13] These charges were eventually withdrawn pursuant to a non-Board settlement.

ANALYSIS AND CONCLUSIONS

Respondents' Withdrawal From Multiemployer Bargaining

All of the substantive complaint allegations here flow from the Respondents' decision to withdraw from multiemployer bargaining. As Respondents maintain in their brief, and counsels for the General Counsel do not disagree, if Respondents lawfully withdrew from multiemployer bargaining, all of the substantive complaint allegations fall, as Respondents, being 8(f) employers, would have otherwise acted within their rights to both withdraw recognition and unilaterally set new terms and conditions of employment for their employees, following expiration of the collective-bargaining agreement. Where the parties differ, of course, is that counsels for the General Counsel assert that Respondents' withdrawal from multiemployer bargaining was untimely and without the assent of the Union and, hence, illegal, while Respondents maintain that the withdrawal was either at the suggestion of the Union, or with its consent, either actual or implied.

The basic guidelines as to withdrawal from multiemployer bargaining units were explicated by the Board, as follows, in *Retail Associates, Inc.*, 120 NLRB 388, 395 (1958):

> We would accordingly refuse to permit the withdrawal of an employer or a union from a duly established multiemployer bargaining unit, except upon adequate written notice given prior to the date set by the contract for modification, or to the agreed-upon date to begin the multiemployer negotiations. Where actual negotiations based on the existing multiemployer unit have begun, we would not permit, except on mutual consent, an abandonment of the unit upon which each side has committed itself to the other, absent unusual circumstances.

The Board's rules attempt to accommodate both the fundamental purpose of the Act of maintaining stability in multiemployer bargaining relationships, once lawfully established, and of allowing the parties their requisite freedom to withdraw their consent at suitable periods. *Southwestern Colorado Contractors Assn.*, 153 NLRB 1141 (1965), enfd. 379 F.2d 360 (10th Cir. 1967).

The Board, in *John Deklewa & Sons*, 282 NLRB 1375 (1987), enfd. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), cert. denied *Deklewa v. NLRB*, 488 U.S. 889 (1988), set different rules to govern the sanctity of collective-bargaining agreements and relationships when recognition was granted to the union under Section 8(f) of the Act, as opposed to Section 9(a). In *James Luterbach Construction Co.*, 315 NLRB 976, 979–980 (1994), the Board applied its *Retail Associates* rule to 8(f) employers as follows:

> In the 8(f) context, we conclude that in order for an employer to obligate itself to be bound by multiemployer bargaining, there must be more than inaction, i.e., the absence of a timely withdrawal. Thus, unlike in *Retail Associates*, supra, mere inaction during multiemployer negotiations will not bind an 8(f) employer to a successor contract reached through those multiemployer negotiations. Rather, the following two part test will be used to decide

> whether an 8(f) employer has obligated itself to be bound by the results of the multiemployer bargaining. First, we will examine whether the employer was part of the multiemployer unit prior to the dispute giving rise to the case. If this first inquiry is answered affirmatively, then we will examine whether that employer has, by a distinct affirmative action, recommitted to the union that it will be bound by the upcoming or current multiemployer negotiations.
>
> . . . .
>
> [A]n 8(f) employer that engages in a distinct affirmative act that would reasonably lead the union to believe that the employer intended to be bound by the upcoming or current negotiations will be deemed to have agreed to be bound by the results of that bargaining. Ultimately, that employer—meeting both parts of our test—will be deemed to have clearly and unmistakably waived both its right to withdraw recognition on contract expiration from the union and its right to bargain as an individual.

However, even when an employer withdraws from multiemployer bargaining on an untimely basis, such withdrawal is lawful if the union consents to such withdrawal, or implies assent or acquiescence through a course of affirmative action which is clearly antithetical to the union's claims that the employer has not withdrawn from multiemployer bargaining. *Preston H. Haskell Co.*, 238 NLRB 943, 948 (1978). The Board considers the totality of the union's conduct towards the withdrawing employer to determine whether the union has acquiesced in the employer's withdrawal. *CTS, Inc.*, 340 NLRB No. 99, slip op. at 5 (2003).[14] "In determining whether the union has consented or acquiesced to the employer's withdrawal, a prime indicator is the union's willingness to engage in individual bargaining with the employer that is seeking to abandon multiemployer bargaining." Id.

The union's failure to immediately object to an employer's attempted withdrawal from multiemployer bargaining is not considered an implied consent to the putative withdrawal, *Haskell*, supra at 948. However, acquiescence does exist where a union engages in separate negotiations with a withdrawing employer, listens to counterproposals, and agrees to make certain concessions not offered the multiemployer association. *I. C. Refrigeration Service*, 200 NLRB 687, 690 (1972), *Hartz-Kirkpatrick Construction Co.*, 195 NLRB 863 (1972). For the reasons set forth below, I conclude that Respondents' withdrawal from multiemployer bargaining was both untimely and unlawful, and that the Union neither agreed to, nor acquiesced, in that withdrawal.

There is little dispute that Respondents obligated themselves to multiemployer bargaining under the two-step test set forth by the Board in *Luterbach*, supra. First, for many years, Respondents were party to multiemployer bargaining and were, hence, part of the multiemployer unit prior to the dispute giving rise to this case. Second, Respondents, prior to the start of the latest round of multiemployer negotiations, designated SMARCA, in writing, as their representative for such negotiations, and then actively engaged in at least three multiemployer negotiating meetings with the Union, and two bargaining strategy sessions with SMARCA and the other contractor members of the association. Thus, Respondents have engaged in distinct affirmative actions, which recommitted to the Union that it would be bound by the multiemployer negotiations.

Since, under the *Luterbach* test, Respondents recommitted to multiemployer bargaining and, thus, cannot withdraw once negotiations have begun,[15] Respondents are bound to the multiemployer negotiations and any resulting agreement, unless the Union agreed or acquiesced to Respondents' untimely withdrawal. Respondents maintain that the Union agreed or acquiesced, arguing that it was the Union that proposed individual bargaining, that the Union did not object to Respondents' withdrawal from multiemployer bargaining, and that the Union acquiesced in Respondents' withdrawal by its actions in bargaining with Kiker and Winona subsequent to Respondents' withdrawal. I conclude to the contrary.

Respondents argue that Danley's "Wisconsin" comment was, in effect, a proposal to bargain individually. Contrariwise, I conclude that Danley's offhand comment was sarcastic or rhetorical, made in the midst of a difficult day of bargaining, and

[14] That the Union's conduct to be measured is vis-à-vis the withdrawing employer is explicitly set forth in the cited case, and numerous other Board decisions. Yet, Respondents, in their brief, cite the Board decision in *Associated Shower Door Co.*, 205 NLRB 677, 681 (1973), for the proposition that "a union's consent may be predicated on its conduct addressed to an employer other than the withdrawing employer." Neither that Board decision, nor the administrative law judge decision on the cited page, sets forth such a rule, nor stands for the proposition asserted by Respondent. Indeed, in the concurring opinion, Chairman Miller, agreeing with the majority's finding of an unfair labor practice, disagreed with the majority as follows: "The [administrative law judge], however, viewed the law as being that union acquiescence to employer withdrawal must be based on interaction between the union and the particular withdrawing employer. I would not adopt this view."

[15] Except under unusual circumstances. See *Charles D. Bonanno Linen Service*, 243 NLRB 1093 (1979), enfd. 630 F.2d 25 (1st Cir. 1980). During the trial, Respondent's counsel explicitly are bound to the multiemployer negotiations and any resulting agreement, unless the Union agreed or acquiesced to Respondents' untimely withdrawal. Respondents maintain that the Union agreed or acquiesced, arguing that it was the Union that proposed individual bargaining, that the Union did not object to Respondents' withdrawal from multiemployer bargaining, and that the Union acquiesced in Respondents' withdrawal by its actions in bargaining with Kiker and Winona subsequent to Respondents' withdrawal. I conclude to the contrary. conceded that there were no unusual circumstances in this case ("I'm not arguing that there are unusual circumstances."), but then attempted to resurrect this argument in his brief, asserting that the Union's negotiations with Kiker and Winona created unusual circumstances. I reject this belated argument. The Board has held that after negotiations have begun, the "unusual circumstance" exception is limited to "cases in which 'the very existence of an employer as a viable business entity has ceased or is about to cease' and to cases where consensual employer withdrawal through separate bargaining have so depleted a unit that it would be 'unfair and harmful to the collective-bargaining process' not to permit one or more of the remaining employers to withdraw." *Charles D. Bonanno Linen Service*, supra at 1093. Neither situation applies here. There is no evidence that the existence of Respondents is threatened, and Respondents can hardly argue that their own withdrawal from multiemployer bargaining has so depleted the unit, that they should be forgiven this alleged transgression.

borne out of the bargaining table frustration of a day spent with little or no progress towards an agreement. Neither the credited context within which Danley made the comment, nor Bigham's sarcastic answer, "Oh yeah Bob, that really works well in Wisconsin," indicates that the comment was anything other than an expression of frustration, and taken as such by SMARCA's representative, Bigham.[16]

In any case, bargaining continued for a considerable period of time subsequent to the comment, and resulted in an offer which Danley took back to the membership for a vote. There was not then, nor at any time thereafter, a serious discussion among the parties concerning individual bargaining. There was only the sarcastic initial response of Bigham, Schwickert's comment as to the employers being a "team," and Danley's agreement with Bigham's comment that individual bargaining would not be good for the industry. Based on such, I cannot conclude that there was a serious offer from the Union to bargain individually, nor that the association, SMARCA, or the individual contractors took Danley's "Wisconsin" comment to be anything other than rhetorical, designed to convey to the other parties the level of frustration Danley was experiencing.

I further conclude that the Union's course of conduct subsequent to Respondents' withdrawal from multiemployer bargaining did not demonstrate agreement with, or acquiescence in, Respondents' withdrawal. As noted above, if union consent to withdrawal is to be implied, its conduct must involve a course of affirmative action which is clearly antithetical to its claims that the employer has not withdrawn from multiemployer bargaining. "Neither the Union's failure to immediately object to Respondent's withdrawal nor its failure immediately to demand Respondent's signature on the contract is considered an implied consent to the putative withdrawal." *Reliable Roofing Co.*, 246 NLRB 716 (1979). However, acquiescence does exist where a union engages in separate negotiations with a withdrawing employer, listens to counterproposals, and agrees to make certain concessions not offered the association. *I. C. Refrigeration*, supra at 690, citing *Hartz-Kirkpatrick Construction Co.*, supra.

Respondents argue that the Union's course of affirmative conduct here includes Danley's attempt to telephone Schwickert, and the resultant voice mail message left for Schwickert about June 15, Danley's conversation with Bigham and subsequent bargaining with SMARCA, Winona, and Kiker on June 13, and subsequent contract negotiating meetings with SMARCA, Winona, and Kiker. I conclude, however, that these occurrences do not amount to a course of affirmative action clearly antithetical to the Union's position, particularly where, as here, the Union, instead of agreeing to Respondents' withdrawal, sent a letter to SMARCA on July 8 protesting Respondents' withdrawal, and then filed 8(a)(5) charges against Respondents on July 21, alleging untimely and illegal withdrawal from multiemployer bargaining. The filing of unfair labor practice charges here, based on Respondents' withdrawal from multiemployer bargaining, is as definitive a demand to return to multiemployer bargaining as any that could be uttered verbally. See *Preston H. Haskell Co.*, supra at 943.

While it is true that the Union continued to bargain with SMARCA, Kiker, and Winona without the presence or participation of Respondents, the Union had little choice after Respondents communicated their untimely withdrawal from multiemployer bargaining and then renounced their relationship with the Union. In short, the Union had no alternative if it was going to represent its membership than to continue to bargain with the remaining members of the multiemployer group and SMARCA. While I concluded, above, that Danley did not explicitly tell Bigham on June 13 that he was willing to proceed on the basis of bargaining with individual employers, even if he had, or even if a union representative at some later date communicated such to SMARCA, it would make no difference because the Union had no choice as a result of Respondents' unfair labor practices. Unlike the Board's decision in *Hi-Way Billboards*, 206 NLRB 22 (1973), cited in Respondents' brief (and by the Supreme Court in *Charles D. Bonano Linen Service v. NLRB*, 454 U.S. 404, 412–415 (1982)), where the union struck the multiemployer group, and then negotiated a contract with one group of employers and continued the strike against other employers thereby creating a whipsaw effect, here the Union was simply continuing to bargain with the contractors who remained after Respondents exited the multiemployer bargaining.

Further, all of these actions of the Union here were in relation to SMARCA and to the contractors other than Respondents. As found above, after Respondents exited multiemployer bargaining, negotiations resumed with the parties taking up and working from the same proposals and tentative agreements that were on the table prior to Respondents' withdrawal, and when those parties reached tentative agreement on July 22 none of the parties changed items previously tentatively agreed to, nor resurrected proposals that had been previously rejected.

The Board has repeatedly held, most recently in *CTS, Inc.*, supra, that the union's course of conduct to be considered is vis-à-vis the withdrawing employer, and that a prime indicator of acquiescence is the union's willingness to engage in individual bargaining with such employer. Here, there is no evidence demonstrating that the Union was willing to engage in individual bargaining with Respondents,[17] and Respondents' argu-

[16] Likewise, for example, an employer representative's bargaining table comment in response to a union demand for a wage increase, to the effect of "maybe we should just give you the keys to the plant," is not a serious proposal that the union assume ownership of the plant in lieu of a wage increase.

[17] Respondents' assertion, in its brief, that in a voicemail message about June 15 or 16, Danley "asked Schwickert to call him so they could arrange a time to meet regarding new agreements" is without any foundation in the record. The brief cites record testimony of Schwickert as to the voicemail as follows: "Mr. Danley said that he received my letter and wanted to arrange a meeting." "He was referring to my June 12th letter indicating we were going to negotiate separately." Respondents' brief also cites record pages containing Danley's testimony as to the voicemail: "I believe I just told him 'Kent, this is Bob. Give me a call. I want to discuss your letter.'" In short, the cited testimony indicates that in his voicemail message, Danley simply asked Schwickert to return his call so they could discuss Schwickert's letter in which Respondents withdrew from multiemployer bargaining. The testimony of Schwickert and Danley cited by Respondents contains nothing of meeting "regarding new agreements." Union contact with a withdrawing employer for the purpose of attempting to secure its return to multiem-

ments as to the Union's course of conduct are centered on the Union's course of continued bargaining with Kiker, Winona, and SMARCA, not with the Respondents. There is also no evidence that the Union expressed a willingness to the Respondents, or even to Kiker or Winona, to discuss terms peculiar to an individual employer's operations and listen to such counterproposals, a further indication that the Union did not acquiesce in Respondents' withdrawal. See *I. C. Refrigeration Service*, supra at 690.

Finally, citing *James Luterbach Construction Co.*, supra at fn. 9 ("absent agreement to the contrary, the employer association may exercise the rights granted employers under *Deklewa* and withdraw recognition from the union on expiration of the collective-bargaining agreement"), Respondents argue that SMARCA's belated letter of December 5 to the Union, repudiating the collective-bargaining agreement and bargaining relationship with the Union on behalf of the association and its individual contractors, and dissolving the multiemployer bargaining group, served to end whatever bargaining obligation remained, and to ameliorate any earlier unfair labor practices.

The Board has held, however, that in the absence of union agreement, untimely dissolution of the multiemployer bargaining group is tantamount to an unlawful withdrawal from multiemployer bargaining. See *NLRB v. Southwestern Colorado Contractors Assn.*, 379 F.2d 360, 363–364 (10th Cir. 1967), enforcing *Southwestern Colorado Contractors Assn.*, 153 NLRB 1141 (1965), where the Court held, "The Board thus concluded that dissolution of the Association was tantamount to attempted withdrawal from a multiemployer unit at an inappropriate time." I conclude, thus, that the dissolution of the association on December 5 does not negate Respondents' unfair labor practices.

This is true regardless of whether the alleged dissolution occurred in December, or in June, as Respondents argue in the alternative. In either case, dissolution would have occurred after the start of multiemployer bargaining, without the agreement or acquiescence of the Union, and over the explicit objection of the Union. Even if dissolution of the association had been accomplished on a timely basis, its mere dissolution would not preclude the obligation of all of its members to engage in multiemployer bargaining with or without the existence of the association. See *Southwestern Colorado Contractors Assn.*, supra at 1143, where the Board held, "In remedying the violation found, we deem it unnecessary to direct the reconstitution of the association since the existence of a formal association is not a prerequisite to the establishment or continuance of a multiemployer bargaining unit."

Of course the December 5 letter[18] seeks more than the dissolution of the association. It also purports, on behalf of the association and the individual contractors, to dissolve the 8(f) bargaining relationship with the Union. And, as Respondents argue, it appears that unless otherwise precluded, even where an individual employer could not withdraw recognition pursuant to Section 8(f), the group, as a whole, could do such. See *Luterbach*, supra at fn. 9.

Here, however, it was Respondents' unremedied unfair labor practices which initiated a chain of events which culminated in the December 5 letter. In view of the history of successful collective bargaining between the Union and the multiemployer group over many years, it appears unlikely that such a letter would have been sent, absent the unfair labor practices.

Further, even if the December 5 letter served to put an end to the continuing unfair labor practices of Respondent in refusing to participate in multiemployer bargaining, it would not negate the commission of those unfair labor practices. In these circumstances, the only effective remedy would be to return the parties to where they were had no unfair labor practices been committed or, in other words, the status quo ante. As the Board held in *Porta-King Building Systems*, 310 NLRB 539 (1993), citing *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 769 (1976), "Our task in applying Section 10(c) is 'to take measures designed to recreate the conditions and relationships that would have been had there been no unfair labor practices.'"

As to bargaining, the status quo ante here is a return by the Respondents to multiemployer bargaining, with or without a formal employer association. See *Southwestern Colorado Contractors Assn.*, supra at 1143. This result is consistent with the courts' and Board's oft-expressed view of the important role multiemployer bargaining occupies in the labor relations arena, and of the necessity of stability to the success of multiemployer bargaining. As set forth by the Supreme Court, "by permitting the union and employers to concentrate their bargaining resources on the negotiation of a single contract, multiemployer bargaining enhances the efficiency and effectiveness of the collective-bargaining process and thereby reduces industrial strife. For these reasons, Congress has recognized multiemployer bargaining as a 'vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining.'" *NLRB v. Teamsters Local 449*, 353 U.S. 87 at 95 (1957).

Here, it appears that Respondents became unhappy during contract negotiations with the Union over the Union's failure to move on subcontracting, an issue of significance to Respondents. Indeed, Schwickert's letter of June 11 to the Union cites the subcontracting issue as a basis for Respondents' withdrawal from multiemployer bargaining. But, a party's unhappiness with the course of bargaining or with the bargaining proposals of the other side does not validate an otherwise untimely withdrawal from multiemployer bargaining. Indeed, the Board's rules as to multiemployer bargaining are designed to assure a certain degree of stability, and to avoid the breakup of such bargaining just because the parties differ as to a particular bar-

ployer bargaining is not evidence demonstrative of acquiescence. See *I. C. Refrigeration Service*, supra at 690. There is no evidence that the Union, either by this phone message, or by any other actions or words, indicated it was interested in bargaining a separate contract with Respondents.

[18] I also note that despite the wording of the December 5 letter, ending the 8(f) bargaining relationships between the contractors and the Union, essentially nothing changed. Thus, SMARCA, Kiker, and Winona continued to bargain with the Union, reaching agreement on all terms, except whether SMARCA would be included in the wording. Respondents continued not to participate in this bargaining. Thus, it appears that the only purpose of the letter was to attempt to negate Respondents' earlier, unremedied, unfair labor practices.

gaining issue or issues, or because of other ephemeral difficulties in bargaining.

Respondents' Postwithdrawal Unilateral Changes

Because I have found under the two-step *Luterbach* test that Respondents obligated themselves to be bound by multiemployer bargaining, I further conclude that Respondents could not on June 18 unilaterally discontinue their 8(f) relationship with the Union and, thus, could not on June 19 unilaterally change wages, benefits, and other terms and conditions of employment.[19] As the Board said in *Luterbach*, supra at 980, an employer that meets both parts of the test, "will be deemed to have clearly and unmistakably waived both its right to withdraw recognition on contract expiration from the union, and its right to bargain as an individual." Here, there is no dispute that Respondents, on June 19, unilaterally changed their employees' terms and conditions of employment, as described above. Those actions violate Section 8(a)(5).

Respondents' Actions at the June 19 Employee Meeting

Again, these 8(a)(1) allegations are dependent upon the 8(a)(5) outcome. Inasmuch as I have concluded that Respondents were bound to multiemployer bargaining, and could not, on June 18, unilaterally discontinue their bargaining relationships with the Union, I further conclude that Respondents could not tell employees that they would no longer enjoy union representation, that Respondents had repudiated their relationships with the Union and would no longer deal with the Union as the employees' representative, that the Union could fine employees who continued to work for Respondents, and that Respondents would discontinue union benefit programs.

Counsels for the General Counsel assert that Respondents' actions in preparing and placing union resignation forms at the back of the meeting room and, further, distributing stamped envelopes to employees and advising them that the purpose of the envelopes was to mail the resignations to the Union, interfered with and restrained Respondents' employees. Respondents' brief does not discuss this specific allegation, but argues that all of the 8(a)(1) and (3) allegations should be dismissed because the 8(a)(5) allegations are nonmeritorious. I conclude, that in the context of the other 8(a)(1) violations committed at the June 19 meeting, and the unsolicited discussion of possible Union fines, the employees would tend to feel peril in refraining from utilizing the forms, and that, thus, Respondents' conduct violated Section 8(a)(1). See *Mueller Energy Services*, 333 NLRB 262 (2001).

Constructive Discharges

Counsels for the General Counsel maintain that former employees of Respondents, Ben Pugh, Ryan Augustine, Jerome Mundt, Raymond Oman, and Brad Musel, all of whom resigned within about a month of the June 19 meeting, were, in effect, constructively discharged by Respondents. Respondents, in their brief, simply argue that "this theory is dependent on a finding that the employers unlawfully withdrew recognition from the Union [and] General Counsel cannot prove that the employers unlawfully withdrew recognition." In support of their position, counsels for the General Counsel cite the Board's decisions in *Control Services*, 303 NLRB 481 (1991), and *Excel Fire Protection Co.*, 308 NLRB 241, 248 (1992).

The Board, in *Control Services*, in finding an unfair labor practice, reasoned as follows: "we rely on the theory of constructive discharge applicable to employees who quit after being confronted with a choice between resignation or continued employment conditioned on relinquishment of statutory rights." Id. at 485. With the exception of Pugh,[20] Respondents do not seriously argue that the five-named alleged discriminatees resigned for any reason other than Respondents' actions of June 18 and 19, in renouncing their bargaining relationship with the Union and unilaterally imposing new terms and conditions of employment. As I have found, above, that all five former employees resigned because of Respondents' actions vis-à-vis their representation by the Union and because of Respondents' unilateral changes, I conclude that they were, in fact, constructively discharged by Respondents, and entitled to reinstatement. See *Electric Machinery Co.*, 243 NLRB 239, 240 (1979).

CONCLUSIONS OF LAW

1. Respondents and the association are engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. At all material times, the Union has been, and is now, pursuant to Section 8(f) of the Act, the exclusive collective-bargaining representative of the following appropriate bargaining unit of Respondents' employees:

> All full and regular part time journeymen and apprentice employees employed as roofers, and damp and waterproofing workers by Respondents, excluding guards and supervisors as defined in the Act, and all other employees.

4. Since June 11, 2003, Respondents have failed and refused to recognize and bargain in good faith with the Union as the exclusive collective-bargaining representative of their employees within the unit described above in violation of Section 8(a)(5) of the Act by: about June 11, withdrawing from multiemployer bargaining; about June 19, withdrawing recognition from the Union and, thereafter, refusing to recognize or bargain with the Union; and about June 19, unilaterally implementing new terms and conditions of employment.

5. Respondents constructively discharged the following employees in violation of Section 8(a)(3) of the Act, about the dates set forth after their names: Ray Oman (end of June 2003), Brad Musel (end of June 2003), Jerry Mundt (mid-July 2003),

[19] Respondents' brief, citing *Wehr Constructors, Inc.*, 159 F.3d 946 (6th Cir. 1998), correctly posits that if Respondents were not bound to multiemployer bargaining they would be free to unilaterally set new terms and conditions of employment upon expiration of the 8(f) collective-bargaining agreement. Of course, I have found Respondents so bound.

[20] As to former employee Ben Pugh, Respondents assert that whether Pugh resigned because of the union representation issue is "speculative." As I found, above, in crediting his testimony, Pugh did, in fact, resign because he did not want to work without the benefit of representation by the Union.

Ryan Augustine (mid-July 2003), and Ben Pugh (July 26, 2003).

6. About June 19, 2003, Respondents interfered with, restrained, and coerced employees in the exercise of Section 7 rights, thereby violating Section 8(a)(1), by engaging in the following acts and conduct: informing employees that they would no longer be represented by the Union; and distributing prestamped envelopes to employees to be used to mail resignation forms to the Union, such forms having been made available by Respondents to their employees.

7. The unfair labor practices committed by Respondents affect commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[21]

ORDER

The Respondents, Schwickert's of Rochester, Inc., Rochester, Minnesota, and Schwickert, Inc., of Mankato, Minnesota, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Constructively discharging or otherwise discriminating against employees because they engage in union activities or to discourage employees from engaging in such activities.

(b) Withdrawing or withholding recognition from the Union, unilaterally changing, or imposing new, terms and conditions of employment on their employees, refusing to participate in multiemployer bargaining as to these employees with the Union, or otherwise refusing to bargain in good faith with the Union as the exclusive collective-bargaining representative of their employees within the unit set forth above.

(c) Informing employees that they are no longer represented by the Union, or providing employees with forms and stamped envelopes for the purpose of resigning from the Union, or in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, Respondent Schwickert offer Ben Pugh, Ryan Augustine, and Jerome Mundt, and Respondent Schwickert's Rochester offer Raymond Oman and Brad Musel, full and immediate reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed.

(b) Make whole Ben Pugh, Ryan Augustine, Jerome Mundt, Raymond Oman, and Brad Musel for any loss of earnings and other benefits suffered as a result of the discrimination against them, computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(c) Recognize the Union as the exclusive collective-bargaining representative of employees within the unit set forth above, bargain in good faith with the Union upon its request, as part of the multiemployer bargaining group, make their employees whole for any losses or expenses incurred as a result of the changes in wages, benefits, and other terms and conditions of employment implemented about June 19, 2004, without bargaining with the Union, and restore the wages, benefits, and other terms and conditions of employment in effect prior to those changes.

(d) Within 14 days from the date of this Order, remove from their files any references to the constructive discharges or involuntary resignations of Ben Pugh, Ryan Augustine, Jerome Mundt, Raymond Oman, and Brad Musel and, within 3 days thereafter, notify them in writing that this has been done and that the unlawful conduct will not be used against them in any way.

(e) Within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, preserve and provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of the Order.

(f) Within 14 days after service by the Region, post at their facilities in Rochester and Mankato, Minnesota, copies of the attached notice marked "Appendix."[22] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondents' authorized representatives, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondents have gone out of business or closed the facilities involved in these proceedings, Respondents shall duplicate and mail, at their own expense, copies of the notice to all employees and former employees employed by Respondents at any time since March 15, 2003.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondents have taken to comply.

Dated, Washington, D.C. May 25, 2004

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

[21] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[22] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT provide you with union resignation forms, nor with stamps or envelopes with which to mail the forms.

WE WILL NOT inform you that you will no longer be represented by the United Union of Roofers, Waterproofers and Allied Workers Local Union No. 96 (Union), at a time when we are obligated to recognize the Union as your collective-bargaining representative in the following appropriate bargaining unit:

All full and regular part time journeymen and apprentice employees employed as roofers, and damp and waterproofing workers by us at our Rochester and Mankato, Minnesota facilities, excluding guards and supervisors as defined in the Act, and all other employees.

WE WILL NOT constructively discharge our employees by forcing them to quit and work elsewhere in order to continue to be represented by the Union, at a time when we are obligated to recognize the Union as your collective-bargaining representative.

WE WILL NOT withdraw or withhold recognition of the Union as your representative, and

WE WILL NOT fail or refuse to bargain with the Union at a time when we are obligated to recognize the Union as your collective-bargaining representative.

WE WILL NOT change any employment terms of employees in the above-described appropriate bargaining units without first notifying the Union of the proposed changes and giving it an opportunity to bargain about such changes.

WE WILL NOT refuse to bargain with the Union on a multiemployer basis.

WE WILL offer to Ray Oman, Brad Musel, Jerry Mundt, Ryan Augustine, and Ben Pugh their jobs back, along with all seniority and other rights and privileges.

WE WILL pay Ray Oman, Brad Musel, Jerry Mundt, Ryan Augustine, and Ben Pugh for the wages and other benefits they lost because we forced them to quit.

WE WILL remove from our records any and all references to the terminations or resignations of Ray Oman, Brad Musel, Jerry Mundt, Ryan Augustine, and Ben Pugh, and notify them in writing that this has been done.

WE WILL revoke the changes in wages, benefits, and other terms and conditions of employment which we implemented about June 19, 2003, without first bargaining with the Union.

WE WILL make whole each bargaining unit employee for any losses or expenses incurred as a result of the changes in wages, benefits, and other terms and conditions of employment we implemented about June 19, 2003, without first bargaining with the Union.

WE WILL recognize the Union as the exclusive representative of our employees in the unit set forth above.

WE WILL, upon request of the Union, rejoin multiemployer bargaining, and bargain with the Union on that basis.

SCHWICKERT'S OF ROCHESTER, INC. AND SCHWICKERT, INC.